Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-825

ANTHONY LA DUCA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No.

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ANTHONY LA DUCA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Anthony La Duca, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, entered in the above entitled case on October 22, 1976; a timely petition for rehearing was denied on November 16, 1976. The Court of Appeals has granted a stay of its mandate pending petition to this Court pursuant to F.R.A.P. 41(b).

## CITATION TO OPINION BELOW

The defendant's conviction in the trial court district court was affirmed by judgment-order, without opinion. The judgment-order is included in the appendix *infra* at 1a.

## JURISDICTION

The Court of Appeals for the Third Circuit affirmed a judgment of conviction entered in the district court for the District of New Jersey. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

## QUESTIONS PRESENTED FOR REVIEW

1. Whether in a prosecution for embezzlement of pension funds under 18 U.S.C. § 664, the Government was obliged to prove in its case in chief as a jurisdictional element, that there was a "written communication" to the employees to satisfy the statutory definition as then in force in 29 U.S.C. § 302(a)(2), which definition is specifically referred to in the statute creating and defining the offense?

2. Whether in a prosecution for embezzlement of pension funds under 18 U.S.C. § 664 the Government must prove beyond a reasonable doubt that the pension fund was covered by the federal statute, even though that precise issue was not raised until after verdict of guilty by way of a motion for a judgment n.o.v. or in the alternative for a new trial?



## CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V

"No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

*18 U.S.C. ∫ 664 Theft or embezzlement from employee benefit plan [as relevant to this proceeding]*

> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
>
> As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 302(a)(2) definition of employee benefit plan [as relevant to this proceeding]

"any plan, fund or program which is communicated or its benefits described in writing to the employees, and which . . . is established by an employer or . . . employee organization . . . for the purpose of providing for its participants or their beneficiaries. . . ."

## STATEMENT OF THE CASE

This case involves a prosecution under 18 U.S.C. § 664, charging the appellant-petitioner, Anthony La Duca with aiding and abetting another individual in the conversion and embezzlement of $100,000 from the Paper Industry Union & Management Pension Fund of New York City. The subject pension fund was established in 1963 for members of the United Paper Workers International Union. 27,000 of the 400,000 members of that union are covered; its assets were testified to be in the 23 million dollar range; it is funded by contributions from the participating employers.

Effective January 1, 1975 the scope of federal regulation over pension funds was enlarged very substantially by the enactment of the Employee Retirement Income Security Act of 1974 [Pub. L. 93-406]. The embezzlement at issue is alleged to have occurred prior to that date and hence the controlling statutory provision was the Welfare and Pension Plan Disclosure Act of 1958, as amended in 1962. The federal criminal statute in its relevant language defined a covered pension fund as "any such plan subject to the provisions of the Welfare and Pension Plans Disclosure Act." The definitional provision of that act was found in now repealed 29 U.S.C. § 302(a)(2) and by its express terms required *written communication* of its benefits to employees. Presumably the failure to give written communication may have prevented vesting of the plan's benefits. Whatever the reasons, however, Congress required written communication to employees before the Disclosure Act would apply to the given pension fund. The Retirement Act of 1974 requires no similar written communication and covers broadly virtually all plans that provide retirement income to employees or result in deferral of income by employees. Compare 29 U.S.C. § 1002(2).



During the Government's case in chief the prosecutor asked the pension fund trustee the following question which may have elicited proof of the required written communication: "Now, are the pensioners—do they get something in writing which indicates what the position of the Fund is?" The witness did not give a responsive answer and went on instead to describe how the fund was administered. Absolutely no proof was offered that the employees received a written description of the plan's benefits as required by 29 U.S.C. § 302(a)(2) to render the plan subject to the Disclosure Act.

The defense case was predicated on a claim that if an embezzlement had taken place it was by the sole efforts of the co-defendant, who had pleaded guilty, and that the petitioner herein lacked any knowledge of the wrongfulness by which the funds had been acquired. At the close of the Government's case the defendant asked for judgment of acquittal on the grounds that his guilty knowledge had not been proved *prima facie*. The district court denied the motion. The defendant then testified as to his lack of guilty knowledge and the jury ultimately convicted him.

The district court in its charge to the jury explained that under the relevant statute they would have to find that the Paper Industry Union Management Pension Fund was "an employee pension benefit plan." The latter term was not, however, defined, nor was the statutory definition as found in 29 U.S.C. § 302(a)(2) read to the jury. No objection to this omission was raised by the defendant.

In a timely motion for judgment n.o.v. or in the alternative for a new trial, the defendant for the first time raised the failure of the Government to prove that the pension plan involved was subject to the Disclosure Act and the failure of the district court to include the necessary statutory definition in its charge. The district court dismissed the argument as "an afterthought."

A great many issues were raised in the Court of Appeals including the failure of the Government to prove a necessary jurisdictional element of the crime charged. The Court requested argument on the appeal pursuant to its local rules, asked the parties whether the fund was in fact subject to the Act, and then summarily affirmed by judgment-order without explaining its view on the jurisdictional issue.

The petitioner seeks a writ of certiorari limited to issues surrounding the jurisdictional defect in the Government's proofs. The panel of the Court of Appeals by its questioning seemed to feel that the failure to include this defect in the defendant's motion for a judgment of acquittal waived the objection or perhaps that the defendant had stipulated to the presence of the jurisdictional element by focusing upon the *mens rea* aspect of the case as his defense. The Government was admonished during the oral argument, however, to prove the element more convincingly in future cases by introducing relevant pension documents.



## REASONS FOR GRANTING THE WRIT

**This case presents an excellent opportunity for the court to articulate the duty of the government to prove every element of a criminal offense in the context of a federal criminal trial wherein the government failed to prove a jurisdictional element and where that failure was noticed for the first time by the defendant in his motion for a judgment N.O.V. or alternatively for a new trial.**

Defendant was convicted of violating 18 U.S.C. § 664, which at the time of the alleged offense read as follows: *

> §664. Theft or embezzelment from employee benefit plan.
>
> Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined not more than $10,000, or imprisoned not more than five years, or both.
>
> As used in this section, *the term "any employee welfare benefit plan or employee pension benefit plan" Welfare and Pension Plans Disclosure Act.* Added Pub. L. 87-420, § 17(a), Mar. 20, 1962, 76 Stat. 41 (Emphasis added)

At the time of the alleged offense, an "employee pension benefit plan" was defined in 29 U.S.C.A. § 302(a)(2) to mean *"any plan, fund or program which is communicated or its benefits described in writing to the employees,* and

* The statute has since been amended to refer to the Pension Reform Act of 1974 which substantially broadened the scope of federal regulation of employee pension plans. The only pension plans covered by § 664 at the time of the alleged offense were plans "subject to the provisions of the Welfare and Pension Plans Disclosure Act." 18 U.S.C. § 664 [prior to 1974 amendment].

which . . . is established by an employer or . . . employee organization . . . for the purpose of providing for its participants or their beneficiaries. . . ." (emphasis supplied).

In the case at bar, the Government introduced *no* evidence to prove that the Paper Industry Union Management Pension Fund was a plan or fund that was "communicated or its benefits described in writing to the employees."

The Government was aware that communication to the employees was a jurisdictional requirement [without such communication the "pension fund would not have been covered under 29 U.S.C.A. § 301 *et seq*. and 18 U.S.C. § 664 would have been inapplicable]. In fact, the transcript reveals that the prosecutor attempted to elicit the requisite proofs from its witness, Mr. Rolnick:

> "Mr. Plaza: Now are the pensioners—do they get something in writing which indicates what the position of the Fund is?
>
> Mr. Rolnick: I can tell you how it actually starts.
>
> Mr. Plaza: Right.
>
> Mr. Rolnick: A representative approaches the employer and they go into an agreement. They start up a Pension Fund. The employer gives the representative of a union a rundown of how many employees he has, their ages, and they calculate—it is calculated by the Fund.
>
> A younger group of people pays less money . . .
>
> An employee (sic) has a right to contribute more money to allow the employees at the time of their time for pension—they can get more money. There is no set amount other than above the basic figure. They can pay more."
> (1T 52, 13-1T 53, 4).

The fatal deficiency in the Government's proof is apparent on the face of the transcript. When asked (through the use of a leading question) whether the pensioners get something in writing, the witness failed to answer responsively and instead, went into a dissertation on the mechanics of how the fund itself operates. At no time was testimony elicited to demonstrate that the employees received the requisite communication.



The case of *United States v. Daley*, 454 F.2d 505 (1st Cir. 1972), makes clear that in a prosecution under 18 U.S.C. § 664, the Government must prove beyond a reasonable doubt that the Fund involved falls within the statutory definition of an employee pension benefit plan pursuant to 29 U.S.C.A. § 302(a)(2). While in *Daley* the Court found that the Government had produced evidence from which the jury could conclude that the Fund met the statutory definition through the introduction of the original trust agreement, annual reports, testimony on Fund practices and other evidence, (such proofs were not introduced in this case) it was clear that the Court considered proof that the Fund involved was an "employee pension benefit plan" as defined in 29 U.S.C.A. § 302(a)(2) was necessary in order to sustain a conviction.

The due process clause protects the accused against a conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364 (1970). See also, *United States v. Malde*, 513 F. 2d 97 (1st Cir. 1975). The "burden of proving *every* element of the crime beyond a reasonable doubt remains on the prosecution throughout the case *even though the evidence is all one way and uncontradicted.*" *Wilbur v. Mullaney*, 473 F. 2d 943, 947 (1st Cir. 1973); *see also, Mullaney v. Wilbur*, 421 U.S. 684 (1975) (aff'd opinion on remand); *Moore v. United States*, 97 S. Ct. 29 (1976).

The cases of *United States v. Blaffel*, 340 F. Supp. 1140 (N.D. Iowa 1972) and *United States v. Waters*, 73 F. Supp.

72 (D.D.C. 1947) appeal dismissed, 335 U.S. 869 (1948) are examples of this settled principle. In *Blaffel*, defendant was charged with violating 18 U.S.C.A. § 2511(1)(a) which forbade the willful interception of wire communications. "Wire communications" were defined in § 2510(1) as "Communications made through use of facilities. . . operated by any person engaged as a common carrier in providing such facilities for the transportation of interstate or foreign communications."

The Government's evidence showed that defendant had intercepted communications from the Northwestern Bell Telephone Company. Defendant contended that since there was no evidence adduced that Northwestern Bell was a "common carrier which provided facilities for interstate or foreign communications" he was entitled to an acquittal. The Government, on the other hand, contended that these were not essential elements of proof and that if they were, the court should take judicial notice that Northwestern Bell was an interstate carrier. The court granted a judgment of acquittal because of the failure of the Government to prove an essential element of the crime charged.

In *Waters*, defendant was charged and convicted of carrying a pistol. The statute forbade carrying a pistol without a license. On the basis that the burden is on the prosecution to prove each element of the offense charged, the court granted a judgment of acquittal n.o.v.

Perhaps the Paper Industry Union Management Pension Fund was an "employee pension benefit plan" as described in the Act; however, whether it was or was not cannot be discerned from the proofs adduced at trial. Absent a formal record stipulation, the burden was on the Government to prove that fact. In order to prove that fact, the Government had to prove beyond a reasonable doubt that the Fund was a plan, fund or program "which is communicated or its benefits described in writing to the employees."



Moreover, the jury was never informed as to the proofs necessary to prove beyond a reasonable doubt what an "employee pension benefit fund" was, since the trial court failed to inform the jury of what an "employee pension fund" was. The trial court read the indictment to the jury and then instructed the jury that among the elements which were necessary for a conviction of defendant, was proof that the Paper Industry Union Management Pension Fund was an employee pension benefit plan. (5T 72, 11-5T, 73, 18.) Yet, the court never defined for the jury the requisite elements of an "employee benefit pension plan" pursuant to 29 U.S.C.A. §301(a)(2). Instead, the jury was left totally free to decide on its own, what an "employee pension benefit plan" was and whether the Paper Industry Fund satisfied the statutory definition. In leaving the jury free to so speculate, the trial judge committed plain error. *See Shurman v. United States*, 219 F. 2d 282 (5th Cir. 1955) (error not to charge statutory definition).

The Government took the position below that the term "pension fund" is not a term of art and that lay juries need not have explained to them what a pension fund is. It is probably true that most people know in general terms what a pension fund is. But if you asked them specifically what is a pension fund "subject to the provisions of the Welfare and Pension Plans Disclosure Act," it is submitted that no person unaided by 29 U.S.C. §302(2) would have the slightest idea. This is the fundamental flaw in the Government's analysis.

A defendant is entitled to have his guilt determined solely by the jury. *Byrd v. United States*, 342 F. 2d 939 (D.C. Cir. 1965). He has the right to a correct statement of the law from the court. *Thomas v. United States*, 151 F. 2d

183 (6th Cir. 1945). If a jury is to function meaningfully, it must be given a clear statement of each element which the government must prove. *Jackson v. United States*, 348 F. 2d 772 (D.C.Cir. 1965). As stated in *United States v. Noble*, 155 F. 2d 315, 316-317 (3rd Cir. 1946),

> "We think it is self-evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it is equally self-evident that the only appropriate source of that knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law."

It is not sufficient merely to read an indictment or a statute. The court in its instructions to the jury, is required to give sufficient definitions to enable the jury to perform its functions. *United States v. Harris*, 346 F. 2d 182 (4th Cir. 1965); It is error not to charge statutory definitions. *Shurman v. United States*, 219 F. 2d 282 (5th Cir. 1955). The fact that defense counsel did not submit a request to charge does not save this charge from being "plain error." See Federal Rules of Criminal Procedure 52(3). "In the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge." *Williamson v. United States*, 332 F. 2d 123, 132 (5th Cir. 1964).

Where the error is so fundamental as not to submit to the jury the essential ingredients of the offense, it is plain error. *Screws v. United States*, 325 U.S. 91, 107 (1945). It is the court's duty to charge a jury on all essential questions of law whether requested or not. *United States v. Levy*, 153 F. 2d 995 (3rd Cir. 1946); *United States v. Rybicki*, 403 F. 2d 559 (6th Cir. 1968). This is so even where defense counsel has virtually conceded defendant's commission of



the acts charged. *Merrill v. United States*, 338 F. 2d 763 (5th Cir. 1964); *Byrd v. United States*, 342 F. 2d 939 (D.C. Cir. 1965).

The failure of the Government to prove that the Paper Industry Union Management Pension Fund was a plan or fund that was "communicated or its benefits described in writing to the employees" and the failure of the trial court to even read to the jury the statutory definition of an "employee benefit pension plan" much less to explain to the jury the requisite elements of such a plan, required that the Court of Appeals reverse the defendant's conviction. Its failure to do so was so serious a departure from settled legal and constitutional principles as to require the exercise of this Court's supervision by Writ of Certiorari. *Compare Moore v. United States*, 97 S.Ct. 29 (1976) where this Court early this term granted certiorari and summarily reversed a conviction, upheld without opinion by the Fifth Circuit, where the only proof of an essential element was obvious inadmissible hearsay.

The result in *Moore*, *supra*, was so far from the mark that this Court should not have been required to exercise its jurisdiction. In the instant case the failure to prove a key jurisdictional element may have been inadvertent and it may be relatively easy to prove that element to the satisfaction of the trier of fact. Indeed, at the argument in the Court of Appeals the panel asked counsel for each side whether the fund was a covered one. Defense counsel answered honestly: "I do not know." The Government answered: "Yes." Thereafter, on the same day as the argument, the Court of Appeals, *without explanation*, entered its judgment-order affirming the conviction. Its questioning implicitly acknowledged that the trial record was barren on this crucial question. The panel even asked the Government whether the record supported the necessary written

communication and the candid answer was "no." Yet, the proffer of proof on the question ["yes"] was enough for the Court of Appeals. Acting as judge and jury the Court of Appeals "convicted" the defendant by affirming his conviction upon the Government's proffer of jurisdiction.

Because it rendered only a judgment-order, the defendant will never know exactly why his conviction was affirmed without proof of this jurisdictional element. It may have been that the panel concluded that the pension fund was not jurisdictional; perhaps that it was jurisdictional but waived by defendant's failure to include the failure of proof in his motion at the end of the Government's case; maybe that the pension fund was obviously covered by the Disclosure Act and that a remand would be a useless gesture; maybe that "written communication" was inferentially satisfied by the Government's proofs and that the jury need not pass upon the issue since not specifically included in defendant's requests to charge the jury, etc.

The most likely choice above is that the Court of Appeals concluded in its own mind that retrial would be an inefficient utilization of scarce resources in an era when speedy trial considerations are paramount. But there must be limits placed upon such considerations. Assuming that the Government failed to prove its case in chief in the trial court, it is patently unacceptable to permit the kind of trial on the missing issue that occurred in the Court of Appeals. Only by granting the writ of certiorari and summarily reversing the Court of Appeals can the elementary proposition articulated in *Moore* be vindicated: that the prosecution shoulders the burden *at trial* of proving beyond a reasonable doubt *every element* of the charged offense.

The case has significance beyond the interpretation of this particular superceded statute or the justness of the particular case. It is often the case that the defendant will



focus on a single issue, such as misidentification or alibi as his defense without explicitly contradicting the fact that a robbery, assault or some other charged crime may have taken place. This case presents the important and recurring issue as to whether in such instances the Government must nevertheless prove every element of the crime, including those elements unchallenged, or suffer a judgment of acquittal at the close of its case. And there are subsidiary questions as well. In such cases is it incumbent upon the defendent at the close of the Government's case to identify by motion the missing elements and ask for judgment of acquittal? Or is it sufficient to identify the omission after verdict by way of a motion for new trial or n.o.v. [as was done in this case] or on appeal by way of assignment of error? Further, if a motion is made at the close of the Government's case, ought the Goverment be entitled freely to re-open and fill-in the missing pieces of its case? If so, why should the defendant be compelled to act as his own prosecutor?

These important questions are all raised in the instant case and present an excellent opportunity for the Court to further articulate the ramifications of its insistence last term in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), that the state shoulder the burden of proof on every element of the case in a criminal prosecution. No less can be expected of the federal government when it is the prosecutor. And nothing is more fundamental in federal criminal jurisprudence than that one of the elements of every federal offense is the federal jurisdictional base.

## CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Court of Appeals summarily reversed, and the matter remanded to the district court for a retrial wherein the missing jurisdictional element of the crime charged may be proved beyond a reasonable doubt to the satisfaction of the constitutional trier of fact.

Respectfully submitted,

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## UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1417

UNITED STATES OF AMERICA,

*vs.*

GUIDO ROCCO, JOHN MARTIN NEIMAN, ANTHONY R. LA DUCA, HERMAN LEVINE ANTHONY R. LA DUCA,

*Appellant.*

Appeal from the United States District Court for the District of New Jersey (D. C. Crim. No. 75-56)

Argued October 22, 1976
Before: ALDISERT and GIBBONS, *Circuit Judges*, and McGLYNN, *District Judge*.

## JUDGMENT ORDER

After considering the contentions raised by appellant, to-wit, that: (1) the denial of appellant's application to waive a jury under the circumstances of this case denied appellant his right to a fair trial; (2) appellant is entitled to a judgment of acquittal because of the failure of the government to prove an essential element of the crime charged—namely, that the fund was an employee pension benefit fund as described in 29 U.S.C. § 302(a)(2); (3)

the trial court committed plain error in failing to include in its jury charge a definition and explanation of an employee pension benefit fund permitting the government's lay witness to testify that appellant was committing an act of conversion and in admitting into evidence a document expressing that opinion; (7) the court erred in refusing to excuse a juror who had spoken with a proposed defense witness; (8) the prosecutor was guilty of misconduct in delivering an improper and inflammatory summation; within the meaning of 29 U.S.C. § 302(a)(2); (4) appellant was denied due process of law by the refusal of the trial court to compel a proferred defense witness to raise the privilege against self-incrimination under oath and in response to specific questions; (5) appellant was denied due process of law when the trial court upheld that witness' claim of privilege after the witness had already been convicted of the crime regarding which he would be questioned; (6) the trial court committed reversible error in (9) the prosecutor's discriminatory refusal to stipulate to a polygraph examination under the facts of this case denied appellant due process of law; (10) appellant was entitled to a judgment of acquittal at the close of the government's case because of a failure to prove criminal intent; (11) the government failed to prove the commission of the crime of conversion; (12) the trial court failed to adequately instruct the jury on the issue of aiding and abetting a conversion; (13) the verdict was against the weight of the evidence; (14) this Court has the power to review criminal sentences imposed in a manner that offends the principle of "individualization" implicit in the creation of sentence ranges by Congress; and (15) the trial court abused its discretion and violated due process of law by imposing identical three-year custodial terms upon both defendants, despite the greater culpability and more substantial criminal record of the co-defendant; it is



ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

/s/ Aldisert
Circuit Judge

Attest:

M. Elizabeth Ferguson

Chief Deputy Clerk

DATED: October 22, 1976

## ORDER

After consideration of appellant's petition for rehearing before the original panel, it is

ORDERED that said petition be and the same is hereby denied.

BY THE COURT,

/s/ Aldisert
Circuit Judge

DATED: November 16, 1976

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until December 15, 1976.

Aldisert
Circuit Judge

Dated: December 1, 1976